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7
8 **UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

9 ROBERT JORDAN, SEAN HALBERT,
DANA SKELTON, and VANESSA
10 RUGGLES, individually and on behalf of all
others similarly situated,

11 *Plaintiffs,*

12 *v.*

13 NATIONSTAR MORTGAGE LLC, a
14 Delaware limited liability company,

15 *Defendant.*
16

Case No. 3:14-cv-00787-WHO

CLASS ACTION

**PLAINTIFFS' OPPOSITION TO
DEFENDANT NATIONSTAR MORTGAGE
LLC'S MOTION FOR STAY PURSUANT
TO THE PRIMARY JURISDICTION
DOCTRINE (DKT. 33)**

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1 **I. INTRODUCTION**

2 Servicing its mortgages as if the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et*
3 *seq.* (“TCPA”) simply didn’t exist, Defendant Nationstar Mortgage (“Nationstar”) uses its auto-
4 dialer equipment to make repeated, harassing calls to borrowers’ and non-borrowers’ cellular and
5 landline telephones without their consent. Plaintiffs are four consumers out of thousands who’ve
6 been subjected to these calls and have brought this case seeking statutory damages and related
7 relief.

8 Yet rather than acknowledge its wrongdoing (let alone bring its practices into compliance
9 with the TCPA), Nationstar presents what is increasingly becoming the defense tactic *de jour*: a
10 request that the Court stay the case in light of a backlog of FCC petitions that raise a handful of
11 already-settled issues (such as the definition of the terms “capacity” and “called party” and
12 whether the TCPA applies to debt collectors). Nationstar claims that rulings on these matters are
13 supposedly imminent and urges the Court to wait until the FCC has concluded its process.

14 Nationstar is incorrect and its Motion to Stay should be denied. As explained below,
15 Nationstar and the petitions upon which it relies (one of which has been pending for over two
16 years) seek to upend already settled law. Furthermore, Nationstar cannot satisfy any of the four
17 factors that courts in the Ninth Circuit consider when deciding to stay cases pursuant to the
18 primary jurisdiction doctrine, show that any ruling from the FCC is actually imminent, or show
19 that any decision from the FCC would apply retroactively to absolve Nationstar of its statutory
20 violations. Nationstar also ignores traditional considerations when evaluating stays—including
21 the risk that witnesses’ memories will fade over time and evidence will become stale or
22 unavailable. As such, the Court should deny Nationstar’s Motion for Stay and allow Plaintiffs to
23 have their day in court.

24 **II. BACKGROUND FACTS**

25 Nationstar is a mortgage loan servicer. That is, Nationstar sends out monthly mortgage
26 statements, collects payments, pays the owners/investors of the notes or other appropriate parties,
27 calculates borrower escrows, and performs other functions and duties attendant to the servicing

1 of its mortgage loan portfolio.¹

2 In the course of its business, Nationstar makes thousands of telephone calls to consumers.
3 (First Am. Compl. (“Compl.”), Dkt. 31, ¶ 59.) These calls are harassing and are made without
4 the called parties’ consent. (*Id.* ¶ 4.) In many instances (like with Vanessa Ruffles and Robert
5 Jordan) the consumers don’t even have loans with Nationstar. (*Id.* ¶¶ 32, 52.) Worse yet, in the
6 cases of Ms. Ruggles, Sean Halbert, and Dana Skelton, Nationstar has refused to honor their
7 requests to stop calling them. (*Id.* ¶¶ 38, 50.) Nationstar placed its calls to cell phones (Ruggles,
8 Halbert, and Skelton) and to landlines (Jordan). (*Id.* ¶¶ 27, 44, 53.)

9 In support of its Motion to Stay, Nationstar presents the untested² Declaration of Kent
10 Lemon, a Nationstar Senior Vice President of Command Center Operations. Mr. Lemon states
11 that Nationstar’s dialing equipment “did not store or produce telephone numbers to be called
12 using a random or sequential number generator” and “at the time the calls were placed, [the
13 equipment] lacked the current capacity to store and produce telephone numbers to be called.”
14 (Decl. of Kent Lemon in Support of Mot. Stay (“Lemon Decl.”), Dkt. 34, ¶¶ 2-3.) Plaintiffs
15 allege however, based on having received abandoned calls from Nationstar and other indicators,
16 that Nationstar used/uses auto-dialer equipment that functions in the same manner as a predictive
17 dialer—which Nationstar hasn’t disputed. (*See* Compl. ¶ 22.)

18 Rather than take measures to ensure that the called party has consented to receive its
19 calls, honor consumer requests to not be called, or update its internal do-not-call list, Nationstar

20 ¹ Nationstar’s portfolio recently totaled \$384 billion in unpaid principal balance. *See* Hanah Cho,
21 *Nationstar Mortgage Posts Lower 10 Profit and Acquires a Real Estate Services Company*,
22 Dallas News (May 8, 2014, 9:09 AM) <http://bizbeatblog.dallasnews.com/tag/nationstar-mortgage/>.

23 ² A stay shouldn’t be granted on such a one-sided record, and to the extent any question exists in
24 the Court’s opinion as to whether a stay should be granted, Plaintiffs respectfully request leave to
25 serve document requests related to Mr. Lemon’s declaration (including the modifications that
26 would be needed, if any, to provide Nationstar’s equipment with the so-called current capacity to
27 produce and store numbers using a random number generator and to dial them) and to take his
deposition. *See, e.g., New York State Thruway Auth. v. Level 3 Commc’ns, LLC*, 734 F. Supp. 2d
257, 271 (N.D.N.Y. 2010) (“The Court ventures to state that discovery in this litigation may
actually benefit any discussion before the FCC. As we noted before, if the factors indicate
otherwise at some later point, the doctrine of primary jurisdiction can be raised again.”).

1 asks that this Court to stay this case while the FCC considers the petitions filed in *In re Commc'n*
2 *Innovators' Pet. for Declaratory Ruling*, CG Dkt No. 02-278 (Jun. 7, 2012) ("CI Petition"), *In re*
3 *YouMail's Pet. for Expedited Declaratory Ruling and Clarifications*, CG Dkt No. 02-278 (Apr.
4 19, 2013) ("YouMail Petition"), *In re Prof'l Ass'n for Customer Engagement's Pet. for*
5 *Expedited Declaratory Ruling*, CG Dkt No. 02-278 (Oct. 18, 2013) ("PACE Petition"), and *In re*
6 *United Healthcare Servs. Pet. for Declaratory Ruling Regarding Reassigned Wireless Tel. Nos.*,
7 CG Dkt No. 02-278 (Jan. 16, 2014) ("UHC Petition"). (Mot. Stay 6-8, 12.)

8 As explained below, this Court should deny Nationstar's Motion for Stay.

9 **III. ARGUMENT**

10 The TCPA was enacted to address the "intrusive invasion of privacy" that results from
11 "[u]nrestricted telemarketing." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012)
12 (quoting congressional findings). To state a claim for cellphone calls, a plaintiff must allege that
13 Defendants (1) made any call without the prior express consent of the called party, (2) using an
14 automatic dialing system, (3) to any number assigned to a cellular telephone service. *See*
15 *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950 (9th Cir. 2009). For landline phones,
16 plaintiffs must allege the defendant "(1) initiated the call to his residential landline, (2) with an
17 artificial or prerecorded voice, (3) to deliver a message, (4) without his prior express consent,
18 and (5) the call was not for one of the permissible purposes." *See Abramson v. Caribbean Cruise*
19 *Line, Inc.*, No. 2:14-CV-00435, 2014 WL 2938626 (W.D. Pa. June 30, 2014).³

21 ³ The TCPA states, in relevant part, that it "shall be unlawful for any person within the United
22 States, or any person outside of the United States if the recipient is within the United States[:]

23 ...to make any call (other than a call made for emergency purposes or made
24 with the prior express consent of the called party) using any automatic
25 telephone dialing system or an artificial or prerecorded voice...to any telephone
26 number assigned to a paging service, cellular telephone service, specialized
27 mobile radio service, or other radio common carrier service, or any service for
28 which the called party is charged for the call [(227(b)(1)(A)(iii)); or]

...to initiate any telephone call to any residential telephone line using an
artificial or prerecorded voice to deliver a message without the prior express
consent of the called party, unless the call is initiated for emergency purposes or

1 The primary jurisdiction doctrine (upon which Nationstar bases its Motion to Stay) “does
2 not require that all claims within an agency’s purview be decided by the agency.” *Brown v. MCI*
3 *WorldCom Network Serv., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). Nor is it intended “to
4 secure expert advice for the courts from regulatory agencies every time a court is presented with
5 an issue conceivably within the agency’s ambit.” *Id.* (quoting *U.S. v. General Dynamics Corp.*,
6 828 F.2d 1356, 1365 (9th Cir. 2002)). Instead, primary jurisdiction is properly invoked as a basis
7 for staying a case only when a case pending in federal court “requires resolution of an issue of
8 first impression, or of a particularly complicated issue that Congress has committed to a
9 regulatory agency.” *Brown*, 277 F.3d at 1172; *see also General Dynamics*, 828 F.2d at 1362
10 (“The doctrine applies when protection of the integrity of a regulatory scheme dictates
11 preliminary resort to the agency which administers the scheme.”).

12 “Primary jurisdiction is not implicated simply because a case presents a question, over
13 which the FCC could have jurisdiction . . . Rather, primary jurisdiction is properly invoked when
14 a case presents a far-reaching question that ‘requires expertise or uniformity in administration.’”
15 *Brown*, 277 F.3d at 1172. Ultimately, the doctrine “applies in a limited set of circumstances,”
16 *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008), and “is to be invoked
17 sparingly, as it often results in added expense and delay.” *Alpha Pharma, Inc. v. Pennfield Oil Co.*,
18 411 F.3d 934, 938 (8th Cir. 2005).

19 In the Ninth Circuit, courts asked to apply the doctrine consider whether: (i) the issue is
20 within the “conventional experiences of judges,” (ii) the issue “involves technical or policy
21 considerations within the agency’s particular field of expertise,” (iii) the issue “is particularly
22 within the agency’s discretion,” and (iv) “there exists a substantial danger of inconsistent
23 rulings.” *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1048-49 (9th Cir.

25 is exempted by rule or order by the Commission under paragraph (2)(B)
26 [(227(b)(1)(B))].

27 As explained above, *supra* Section II., Nationstar’s automated and prerecorded voice calls were
placed to cellphones (Ruggles, Halbert, and Skelton) as well as to landlines (Jordan).

2011)).⁴

Nationstar claims this case should be stayed because three issues are supposedly pending before the FCC: (1) the definition of “capacity” as used in the TCPA, specifically whether its dialing equipment must have the “current capacity” (as opposed to what Nationstar calls the “theoretical capacity”) to store or produce telephone numbers to be dialed and to dial such numbers (hereinafter, the “Capacity Issue”), (2) whether a holder of a reassigned phone number is the “called party” (hereinafter, the “Reassigned Number Issue”), and (3) whether the TCPA applies to debt collectors (hereinafter, the “Debt Collector Issue”). Nationstar’s request for a stay should be denied. As explained below, none of these issues satisfies the test for applying the primary jurisdiction doctrine, no ruling is imminent, it is doubtful that any FCC decision would apply retroactively, and traditional factors considered when evaluating requests for stays weigh against issuing one here.

A. That Multiple Petitions are Pending Before the FCC Does Not Mean this Case Should be Stayed Pursuant to the Primary Jurisdiction Doctrine— Interpretation of the TCPA Terms at Issue Falls Well Within the Experience of Judges, the Issues Haven’t Been Delegated to the FCC, and Any Risk of Inconsistent Rulings is Nominal.

Nationstar’s assertions that its three Issues (Capacity, Reassigned Number, and Debt Collector) show the Ninth Circuit should stay this case pursuant to the primary jurisdiction doctrine fall apart. (*See* Mot. Stay 10-11, 15-16, 17-18.) As explained below, the Issues are well settled and do not require further clarification from the FCC. Nationstar cannot show that these issues were specifically delegated to the FCC. Courts are well suited to address the Issues—each one involves a question of statutory construction—and there is little risk, as evidenced by the decisions to date, of inconsistent adjudications. Accordingly, the primary jurisdiction doctrine

⁴ The Ninth Circuit has also phrased the test as: “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.” *Pimental v. Google, Inc.*, No. C-11-02585-YGR, 2012 WL 1458179, at *4, n.2 (N.D. Cal. Apr. 26, 2012) (quoting *Clark*, 523 F.3d at 1115; *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 782 (9th Cir. 2002)).

1 does not apply.

2 **1. The Capacity Issue does not satisfy any of the four factors that courts**
3 **consider when determining whether to stay a case under the primary**
4 **jurisdiction.**

5 As explained below, notwithstanding the decisions of other Courts to stay the litigation
6 before them and wait (potentially years) for the FCC to rule upon the CI Petition, the YouMail
7 Petition, and the PACE Petition, the capacity question does not satisfy the considerations
8 typically weighed when deciding whether to apply the primary jurisdiction doctrine.

9 *a. First, both the Ninth Circuit and the FCC have already addressed*
10 *the definition of capacity in the context of predictive dialers.*

11 Although Nationstar largely ignores this fact, the simple truth is that this Court can
12 readily decide whether the definition of the term “capacity” means the “current capacity” or
13 “theoretical capacity,” largely because this question has already been addressed by the Ninth
14 Circuit and the FCC.⁵ As the court in *Pimental* explained when denying a similar request for a
15 stay based upon these same pending petitions:

16 A district court is suited to resolve issues of statutory interpretation of . . . the
17 term ‘capacity’ . . . Interpretation of these statutory terms do not require the
18 FCC’s policy expertise or specialized knowledge and are matters safely within the
19 conventional experience of judges. Indeed, courts in the Ninth Circuit and the
20 FCC have interpreted these statutory terms in the past.

21 2012 WL 1458179, at *3 (citing *Satterfield*, 569 F.3d at 951) (“a system need not actually store,
22 produce, or call randomly or sequentially generated telephone numbers, it need only have the
23 capacity to do it”)); *see, e.g., Sherman v. YahooA Inc.*, No. 13-CV-0041-GPC-WVG, 2014 WL
24 369384 (S.D. Cal. Feb. 3, 2014) (“[I]n *Meyer v. Portfolio Recover Associates, LLC*, 707 F.3d
25 1036, 1043 (9th Cir. 2012), the Ninth Circuit specifically considered and rejected a defendant’s
26 argument that its dialers did not fall within the statutory definition of ATDS because its dialers
27 did not ‘have the present capacity to store or produce numbers using a random or sequential
28

29 ⁵ By arguing that its equipment lacked the “current capacity” to perform specific functions,
30 Nationstar is really advancing a defense that its predictive dialer doesn’t meet the definition of an
31 automatic telephone dialing system under the statute, *see* 47 U.S.C. § 227(a)(1), because it
32 doesn’t actually store, produce, or call random numbers at the time calls are made.

number generator.”); *In re Jiffy Lube Int’l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253, 1261 (S.D. Cal. 2012) (citing U.S.D.J. Resp. to Mot. to Dismiss, No. 11-MD-2261-JM-JMA, Dkt. 46) (“As the government argues, ‘Congress anticipated that advancements in technology would allow telemarketers to employ new and more sophisticated ways of auto-dialing large lists of numbers.’”). As the *Meyer* panel explained pointedly:

The FCC further defined “automatic telephone dialing system” to include predictive dialers. *See In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14091–93 (July 3, 2003). “[A] predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.” *Id.* at 14091. “As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective. The basic function of such equipment, however, has not changed—the *capacity* to dial numbers without human intervention.” *Id.* at 14092. PRA’s predictive dialers fall squarely within the FCC’s definition of “automatic telephone dialing system.”

Meyer, 707 F.3d at 1043, *cert. denied*, 133 S. Ct. 2361 (2013). Accordingly, that courts, including the Ninth Circuit, can and have addressed these very issues is unassailable.⁶ As such, the first factor weighs against granting a stay based on any FCC petitions.

b. Second, while equipment considerations fall within the FCC’s field of expertise, the Commission has repeatedly ruled that a predictive dialer constitutes an ATDS.

With respect to the second factor, which asks whether the issue involves technical or policy considerations within the FCC’s expertise, the FCC has already found that a predictive dialer is an ATDS—at least three times. *See, e.g., In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14092-93 (2003); *In re Rules &*

⁶ Notably, Congress is well aware of these decisions and has considered proposed legislation that would limit the TCPA’s definition of ATDS to include only equipment that uses random or sequential number generators. *See Mobile Informational Call Act of 2011*, H.R. 3035, 112th Cong. (2011). In a joint letter to members of Congress, all fifty Attorneys General of the United States expressed their opposition to the proposed legislation in a letter stating: “Most modern automatic dialers, however, already use preprogrammed lists. As a result, H.R. 3035 would effectively allow telemarketers to robo-dial consumers just by avoiding already antiquated technology.” National Association of Attorneys General, Letter to Members of Congress (Dec. 7, 2011), http://law.ga.gov/vgn/images/portal/cit_79369762/179228493Final%20HR3035%20Letter.pdf). In the face of strong opposition, the proposed legislation was later withdrawn.

1 *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 566 (2008).
2 Numerous federal courts, including the Ninth Circuit, have relied on those rulings. *See, e.g.,*
3 *Meyer*, 707 F.3d at 1043; *Lee v. Credit Mgmt., LP*, 846 F. Supp. 2d 716, 729-30 (S.D. Tex.
4 2012); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1129 (W.D. Wash. 2012). Indeed, the
5 FCC could hardly have been clearer, stating first in 2003:

6 We believe the purpose of the requirement that equipment have the “capacity to
7 store or produce telephone numbers to be called” is to ensure that the prohibition
8 on autodialed calls not be circumvented. Therefore, ***the Commission finds that a
predictive dialer falls within the meaning and statutory definition of “automatic
telephone dialing equipment”*** and the intent of Congress.

9 18 FCC Rcd. at 14092-93 (emphasis added). And again, five years later, the FCC expressly
10 reaffirmed that a predictive dialer is an ATDS:

11 In this Declaratory Ruling, ***we affirm that a predictive dialer constitutes an
automatic telephone dialing system*** and is subject to the TCPA’s restrictions on
12 the use of autodialers.

13 23 FCC Rcd. at 566 (emphasis added). Moreover, a third FCC order also confirms that a
14 predictive dialer is an ATDS. *See In re Rules & Regulations Implementing the Tel. Consumer*
15 *Prot. Act of 1991*, 19 FCC Rcd. 19215, 19215 n.1 (2004) (“An automatic telephone dialing
16 system is defined as equipment which has the capacity (A) to store or produce telephone
17 numbers to be called, using a random or sequential number generator; and (B) to dial such
18 numbers. ***This includes ‘predictive dialers’***. . . .”) (emphasis added). In short, a focus on the
19 automated, human-less nature of the dialing process is key, as the FCC and courts have
20 recognized for the better part of a decade.

21 Accordingly, considerations of agency expertise don’t actually support a stay here.

22 *c. Third, the Capacity Issue it is not a question “particularly within*
23 *the agency’s discretion.”*

24 With respect to the third factor, which considers whether the issue is particularly within
25 the agency’s discretion, although Nationstar correctly points out that Congress granted the FCC
26 general authority to interpret the TCPA (Mot. Stay 10), Congress was careful to limit this
27 authority to specific provisions. *See Pimental*, 2012 WL 1458179, at *4 (“Although Defendants

1 argue that the term ‘capacity’ within the definition for ATDS . . . [is] not defined in the TCPA,
2 Congress has not placed this task . . . particularly within the agency’s discretion. *Cf.* 47 U.S.C. §
3 227(b)(2)(C) (discretion to determine whether to exempt certain calls to cellular telephones from
4 the TCPA”). Accordingly, this is not a question that has been specifically reserved for the FCC
5 to decide under the TCPA, and this factor weighs against waiting for the FCC to rule.

6 *d. Fourth, the Capacity Issue does not present a risk of inconsistent*
7 *adjudications.*

8 Nationstar further asserts, without explanation, that “because the TCPA does not define
9 the term ‘capacity,’ there is a risk of ‘significant inconsistent application of FCC rules’ on th[e]
10 [capacity] issue.” (Mot. Stay 11-12.) But the law on the use of predictive dialers is settled. As
11 explained above, the Ninth Circuit has flatly held that predictive dialers qualify as an ATDS even
12 if they don’t have the “present” capacity to store or produce random numbers. (*See* Section
13 (A)(1)(a), *supra*, citing *Meyer*, 707 F.3d at 1043.) Nationstar cites only one authority (a Northern
14 District of Alabama opinion) that has departed from this precedent and held that to meet the
15 definition of ATDS, a system must have “present” capacity to store and call numbers. (Mot. Stay
16 13) (citing *Hunt v. 21st Mortg. Corp.*, No. 2:12-cv-2697-WMA, 2013 WL 5230061, at *4 (N.D.
17 Ala. Sept. 17, 2013)).⁷

18 As the court explained in *Sherman*, however, such decisions are manifestly contrary to
19 what the Ninth Circuit has already decided. 2014 WL 369384 (“In rejecting the defendant’s
20 argument [that “[t]he question at issue is the *present* capacity of defendant’s dialers to store and
21 produce numbers using a random and sequential number generator, not what theoretical, future
22 capacity could be possible if significant time and resources were spent by PRA to modify its
23 dialers,”] the court reaffirmed its previous holding in *Satterfield* that the TCPA focuses on the
24 equipment’s capacity rather than present use.”) (emphasis in original). Accordingly, a handful of

25
26 ⁷ Notwithstanding Nationstar’s lone citation to *Hunt*, Plaintiffs acknowledge that two other
27 courts have reached similar conclusions. *See Gragg v. Orange Cab Co., Inc.*, No. 12-cv-
0576RSL, 2014 WL 801305, at *2 (W.D. Wash. Feb. 28, 2014); *Dominguez v. Yahoo! Inc.*, No.
13-cv-1887, 2014 WL 1096051, at *5-6 (E.D. Pa. March 20, 2014).

1 outliers aside, there is little basis for concluding that the lack of any FCC determination in this
2 regard has resulted in inconsistent adjudications of such import that a stay should be issued.

3 In short, the Ninth Circuit—performing its traditional function of interpreting statutes—
4 has consistently held that predictive dialers (like the equipment that discovery would
5 demonstrate Nationstar used to make the calls at issue in this case) constitute ATDSs under the
6 TCPA. While the question is one that falls within the FCC’s expertise, the issue was not
7 specifically delegated to the FCC and, in any case, the FCC has held three separate times that
8 predictive dialers are ATDSs. And although a handful of courts have taken the “present”
9 capacity bait, there’s no justification for departing from the Ninth Circuit’s binding precedent to
10 the contrary. As such, no stay should be granted based on the Capacity Issue.

11 *e. This Court should decline to follow those judges who have stayed*
12 *cases pending the FCC petitions at issue and who continue to*
await various rulings.

13 Respectfully, this Court shouldn’t follow the four courts Nationstar cites as having
14 recently granted stays based on the pending capacity decisions. (*See* Mot. Stay 12-13.) First, in
15 *Mendoza v. UnitedHealth Grp. Inc.*, No. 13-cv-1553-PJH, 2014 WL 722031 (N.D. Cal. Jan. 6,
16 2014), Judge Hamilton stated that “[a]s the issue raised by MD247 directly overlaps with the
17 legal issues before the court by way of plaintiff’s complaint, the court concludes that the FCC is
18 in the process of utilizing its recognized expertise to consider issues pending before the court. As
19 such, the prerequisites for application of the primary jurisdiction doctrine are satisfied”
20 Such a broad reading of the primary jurisdiction doctrine is inadvisable, as it would require a
21 stay whenever a petition is on file with the FCC that overlaps with the lawsuit and may involve
22 the FCC’s recognized expertise. This would merely encourage more FCC petitions to be filed
23 “challenging” already established rules—thus ensuring that few, if any, lawsuits could move
24 forward and that the FCC’s backlog remains insurmountable. Further, although Judge Hamilton
25 relied on the fact that the FCC had indicated in letters back in September 2013 that a decision
26 would be made “soon,” no decision has been issued in the six months since the Court entered the
27 stay in *Mendoza*.

1 Second, the court in *Higgenbotham v. Diversified Consultants, Inc.*, No. 13-cv-2624-
2 JTM, 2014 WL 1930885 (D. Kan. May 14, 2014) concluded “the statutory reference to
3 ‘capacity’ is unclear.” *Id.* at *3. As explained above, however, this isn’t true in the Ninth Circuit,
4 where the law is settled and a distinction based on “present” capacity has been rejected. (*See*
5 *supra* Section (III)(A)(1)(a) (citing *Meyer*, 707 F.3d at 1043 and *Satterfield*, 569 F.3d at 951).)

6 *Hurrie v. Real Time Resolutions, Inc.*, No. 13-cv-5765-BHS, 2014 WL 670639 (W.D.
7 Wash. Feb. 20, 2014) likewise offers no help to Nationstar. In that case, the court’s one-page
8 opinion states “[t]he complaint alleges that Real Time implements an autodialer to call debtors
9 regarding unpaid debt. The law is unclear whether Congress intended the TCPA to prevent this
10 activity. Telemarketing is one activity while collecting debt from known debtors seems to be a
11 wholly separate activity.” *Id.* at *1. In the instant case, Plaintiffs Jordan and Ruggles allege that
12 they never had any debt with Nationstar, and therefore are not “known debtors.” (*See* Compl. ¶¶
13 32, 52.) *Hurrie* therefore provides no support for staying the case as to them. Likewise, and as
14 set forth below, *infra* Section (III)(C), it is highly questionable whether the FCC will use the CI
15 Petition as a means for revisiting its prior refusal to provide a total exception to debt collectors
16 for calls made. In short, while the TCPA already exempts debt collectors from TCPA
17 prohibitions on “telemarketing” such as complying with certain Do Not Call list rules, debt
18 collectors are still liable for making “any call” or “any telephone call” that violates §
19 227(b)(1)(A) or (b)(1)(B). The FCC has refused to grant a broader exception. Hence, because the
20 stay in *Hurrie* was based on misunderstandings regarding the TCPA’s application to debt
21 collection activity, its reasoning shouldn’t be applied here.

22 Finally, the Court shouldn’t be persuaded to stay the case in light of *Passero v.*
23 *Diversified Consultants, Inc.*, No. 13-CV-338C, 2014 WL 2257185 (W.D.N.Y. May 28, 2014).
24 In that matter, and contrary to the explanation set forth above, *supra* Section (III)(A)(1)(a), Judge
25 Curtin found that the autodialer questions raised by the defendant in that case fell “well outside
26 the conventional experience of this court.” *Id.* at *2. While a colorable argument may exist that
27

1 such a finding was reasonable in light of a dearth of Second Circuit guidance, given controlling
2 Ninth Circuit precedent interpreting these terms, this Court should reach the opposite conclusion.

3 Ultimately, there exists no basis for granting any stay based upon the Capacity Issues. To
4 do so would run counter to the factors traditionally considered when applying the primary
5 jurisdiction doctrine and only result in the case remaining stagnant on the Court’s docket.

6 *f. Nationstar fails to show that any ruling from the FCC, which could*
7 *take years to receive, is actually imminent.*

8 Nationstar further argues, with respect to the capacity issue only, that an FCC ruling is
9 “imminent.” (Mot. Stay 14.) For support, Nationstar cites a series of letters circulated by then-
10 acting director Mignon Clyburn from September 2013—over ten month ago—indicating that
11 with respect to the CI Petition, the Commission expects “to resolve it soon.” (See Exhibit D to
12 the Declaration of Jack Gindi in Support of Motion to Stay (“Gindi Decl.”), Dkt. 35.) Nationstar
13 also cites a blog-post from Commissioner Michael O’Reilly, where he indicates that the
14 Commission “needs to address” the “inventory of petitions as soon as possible.” (Gindi Decl.,
15 Ex. K.) Neither of these sources actually suggests that decisions are imminent.

16 Indeed, the CI Petition has been on file for over two years. The letter from acting director
17 Clyburn was sent almost a year ago and it stated the Commission was working to resolve the
18 matter “soon.” Commissioner O’Reilly’s blog-post is not an official pronouncement by the FCC
19 that decisions are forthcoming; rather, it is merely an indication that even inside the FCC there is
20 recognition that things move at a slow pace and that Commissioner O’Reilly sees a need to move
21 more quickly. That said, his post doesn’t change the fact that such expressions of need don’t
22 signal that action is actually being taken.

23 Likewise, Nationstar’s reliance on *Glauser v. Twilio, Inc.*, No. 11-cv-2584 PJH, 2012
24 WL 259426, at *2-3 (N.D. Cal. Jan. 27, 2012) is seriously misplaced. (Mot. Stay 14.) Although
25 Judge Hamilton granted a stay based on the CI Petition and a separate petition filed by co-
26 Defendant GroupMe, consideration by the FCC was taking so long that GroupMe abandoned its
27 arguments based on the CI Petition and received a ruling from the FCC on its consent question in

1 March 2014 and the stay was thereafter lifted. Had the arguments based upon the CI Petition
2 been pursued and the stay remained in effect, the case would have been stayed for over a year
3 and a half.

4 In sum, there is no basis for concluding that the CI, YouMail, or PACE Petitions will be
5 decided any time “soon” as that term is commonly understood.

6 **2. Courts also have the conventional experience of interpreting the**
7 **meaning of the term “called party” and have consistently interpreted**
8 **it to mean the subscriber of the telephone service at the time the call is**
9 **placed.**

10 As for Nationstar’s second issue—the Reassigned Number Issue—it also implicates a
11 matter of statutory interpretation that has already been interpreted by courts. For example, in
12 *Soppet v. Enhanced Recovery Co., LLC*, Judge Easterbrook faced the question of debt collection
13 calls to reassigned numbers (which Nationstar insists must be determined by the FCC). 679 F.3d
14 637, 639 (7th Cir. 2012), *reh’g denied* (May 25, 2012) (“Neither Soppet nor Tang ever consented
15 to receive automated or recorded calls from Enhanced Recovery—but the two Customers did
16 agree to receive calls at the numbers later assigned to Soppet and Tang.”). The *Soppet* panel
17 analyzed all seven occurrences of “called party” in Section 227 and—finding that none of them
18 supported a reading that equated the consent of the called party with that of the person the debt
19 collector allegedly intended to call (but finding that four “unmistakably denote the current
20 subscriber”)—concluded rhetorically: “The phrase ‘intended recipient’ does not appear
21 anywhere in § 227, so what justification could there be for equating called party’ with ‘intended
22 recipient of the call’?” *Id.* 640.

23 Likewise, the Eleventh Circuit in *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242,
24 1252 (11th Cir. 2014) concluded that the intended recipient of a phone number that has been
25 reassigned, as Nationstar alleges likely occurred in this case with respect to Plaintiffs Ruggles
26 and Jordan, is not the “called party”—the current subscriber of the service called is. *Id.* 1252
27 (“We accordingly reject State Farm’s argument that the “intended recipient” is the “called party”
28 referred to in 47 U.S.C. § 227(b)(1)(A).”).

1 Second, like the capacity issue, Congress has not specifically delegated the question of
2 reassigned numbers to the FCC, nor is the FCC’s expertise needed to interpret the statute or
3 provide workable solutions for businesses like Nationstar. As the Seventh Circuit explained in
4 *Soppet*, several options remain for debt collectors that wish to use predictive dialers.⁸ As such,
5 there is no need to wait however long it may take for the FCC to rule on the UHC and ACA
6 International petitions (neither of which is actually discussed by Nationstar). Rather, the question
7 of reassigned phone numbers is one of statutory interpretation that may be handled by the Court
8 (and has been handled consistently by other Courts).

9 Ignoring the fact that the Ninth Circuit⁹ could readily interpret these issues like the
10 Seventh and Eleventh Circuits have, Nationstar cites three cases, *Heinrichs v. Wells Fargo Bank*,
11 *N.A.*, No. 13-cv-05434-WHA, 2014 WL 2142457 (N.D. Cal. Apr. 15, 2014), *Barrera v. Comcast*
12 *Holdings Corp.*, No. 14-cv-00343-TEH, 2014 WL 1942829 (N.D. Cal. May 12, 2014), and
13 *Higgingbotham v. Hollins*, No. 14-cv-2087-JTM-TJJ, 2014 WL 2865730 (D. Kan. June 24,
14 2014) where courts have decided to wait it out while the FCC considers the United Healthcare
15 and ACA International Petitions. This Court should respectfully decline to join these other
16 courts. For starters, in *Heinrichs*, Judge Alsup simply concluded “Section 227(b)(2) grants the

17 ⁸ “Bill collectors need not abandon predictive dialers. Other options remain:

- 18
- 19 • Have a person make the first call (§ 227(b)(1) is limited to automated calls), then switch
20 to a predictive dialer after verifying that Cell Number still is assigned to Customer.
 - 21 • Use a reverse lookup to identify the current subscriber to Cell Number.
 - 22 • Ask Creditor, who obtained Customer’s consent, whether Customer still is associated
23 with Cell Number—and get an indemnity from Creditor in case a mistake has been made.
(Indemnity may be automatic under ¶ 10 of the 2008 *TCPA Order*, which states that calls
24 placed by a third-party collector on behalf of a creditor are treated as having been made
25 by the creditor itself.)”

26 *Soppet*, 679 F.3d at 642.

27 ⁹ To be sure, district courts in the Ninth Circuit have generally rejected the “intended recipient”
28 argument Nationstar anticipates advancing. *See Olney v. Progressive Cas. Ins. Co.*, No. 13-cv-
2058, 2014 WL 294498, at *3 (S.D. Cal. Jan. 24, 2014) (Judge Gonzalo P. Curiel) (standing
under TCPA not limited to intended recipient); *Gutierrez v. Barclays Group*, No. 10-cv-1012,
2011 WL 579238, at *5 (S.D. Cal. Feb. 9, 2011) (Judge Dana M. Sabraw) (adopting subscriber
definition)

1 FCC authority to promulgate regulations to implement the TCPA.” 2014 WL 2142457, at *1.
2 While it is true that the FCC can issue certain regulations, Congress did not grant it total
3 authority—it is generally limited to proscribing exceptions for certain businesses and entities.
4 *See* 47 U.S.C. § 227(b)(2)(A)–(G). Judge Alsup basically ignored the factor that asks whether the
5 issue is one that falls generally within the conventional experience of judges (although he
6 acknowledged that courts have been mostly consistent in rejecting the “intended recipient”
7 interpretation).¹⁰

8 Similarly, in *Barrera* Judge Henderson found, while applying the test for primary
9 jurisdiction as articulated in *Syntek* (*see supra* n.4), that the TCPA granted the FCC broad
10 discretion to interpret and enforce the TCPA. 2014 WL 1942829, at *2 (citing *Charvat v.*
11 *EchoStar Satellite, LLC*, 630 F.3d 459, 466–67 (6th Cir. 2010)). Like Judge Alsup, Judge
12 Henderson overlooked that the issue is one of statutory interpretation, which falls well within the
13 purview of judges, and that unlike the issue of whether the TCPA grants a blanket exemption for
14 debt collectors, the Reassigned Number Issue is not one that has been delegated specifically to
15 the FCC for resolution.

16 Finally, the court in *Higgingbotham* provides almost no analysis other than to cite other
17 courts that have granted stays. *See* 2014 WL 2865730. As such, this Court shouldn’t find the
18 *Higgingbotham* reasoning all that persuasive.

19 Because the Reassigned Number Issue doesn’t pass the four-factor test, primary
20 jurisdiction does not support a stay here.

21 **3. Lastly, courts are well equipped to determine whether the TCPA**
22 **extends to debt collection activities—and have done so consistently**
23 **following FCC guidance.**

24 For its final issue, the Debt Collector Issue, Nationstar claims a stay is warranted in light
25 of questions regarding whether the TCPA applies to debt collection activity in the first place.

26 ¹⁰ It is worth noting that Judge Alsup only granted a six-month stay, which could be even shorter
27 if the FCC rules in the interim. *Heinrichs*, 2014 WL 2142457, at *2 (“[T]his action will be stayed
28 until the sooner of six months or such closer time as the FCC decides to act or rule in such a way
as to eviscerate the pending action.”).

1 (See Mot. Stay 17-18.) This is incorrect.

2 Admittedly, the providing of express exemptions under the TCPA has been committed to
3 the discretion of the FCC. See 47 U.S.C. § 227(b)(2)(C). As such, as it pertains to the Debt
4 Collector Issue only, it appears that Nationstar can satisfy the second and third factors under the
5 primary jurisdiction test (whether debt collection is expressly within the FCC’s field of expertise
6 and is reserved for the FCC to decide). However, that still isn’t enough to warrant staying even
7 this part of the case. First, Nationstar can’t point to a petition pending before the FCC where this
8 issue has actually been raised such that the Court needs to await a ruling. That is, although
9 Nationstar cites to cases saying this issue is before the FCC, it has not, and cannot, identify any
10 petition that actually raises the issue of the TCPA’s application to debt collection calls more
11 generally. (See Mot. Stay 17-18.)

12 The cases Nationstar cites (*Hurrlé*, 2014 WL 670639, *Higgingbotham*, 2014 WL
13 2865730, and *Passero*, 2014 WL 2257185) seemingly rely on the CI Petition, but a careful read
14 of that petition shows the issue of debt collection isn’t raised directly. Rather, any reference to
15 debt collection is tied to Communication Innovator’s discussion regarding the use of its dialing
16 equipment. At best, therefore, the CI Petition merely presents a chance for comment on this
17 point—it isn’t the focus of the petition. See *Higgenbotham*, No. 13-cv-02624-JTM-JPO, Dkt. 22,
18 n.12) (noting that, “Defendant asserts that whether the TCPA applies to non-telemarketing
19 activity (i.e., debt collection activity) is an open question. The court disagrees, but recognizes
20 that the FCC will have a chance to clarify its position in this regard in response to the
21 Communication Innovators petition.”). It is therefore questionable whether the FCC will view
22 the CI Petition as a vehicle for revisiting its prior determinations regarding the TCPA’s
23 application to debt collectors.

24 Second, even if debt collection in general was squarely before the FCC, as with the
25 Capacity Issue the FCC has already held that debt collection calls do not enjoy a *carte blanche*
26 exclusion from the TCPA. The FCC’s 2008 guidance explains:

1 We also reiterate that the plain language of section 227(b)(1)(A)(iii) prohibits the
2 use of autodialers to make any call to a wireless number in the absence of an
3 emergency or the prior express consent of the called party. We note that this
4 prohibition applies regardless of the content of the call, and is not limited only to
5 calls that constitute “telephone solicitations.” However, we agree with ACA and
6 other commenters that calls solely for the purpose of debt collection are not
7 telephone solicitations and do not constitute telemarketing. Therefore, calls
8 regarding debt collection or to recover payments are not subject to the TCPA’s
9 separate restrictions on “telephone solicitations.”

10 *In the Matter of Rules & Regulations*, 23 F.C.C. Rcd. at 565, n.42 (2008) (explaining that the
11 National Do-Not-Call List does not apply to calls that do not fall within the definition of
12 “telephone solicitation” as defined in section 227(a)(3).) Hence, debt collectors already enjoy a
13 limited exclusion—and it would contradict the TCPA’s plain language barring “any call” made
14 using an ATDS without consent (or “any telephone call” with a pre-recorded voice in the case of
15 landlines) to exempt them wholesale.

16 Third, and contrary to the *Hurrie* decision, courts in the Ninth Circuit (and elsewhere)
17 have otherwise consistently applied the rule that the TCPA applies to debt collectors. *See Iniguez*
18 *v. The CBE Grp.*, 969 F. Supp. 2d 1241, 1247 (E.D. Cal. 2013), *recons. denied* (Dec. 5, 2013)
19 (“The TCPA therefore applies to debt collectors and they may be liable for offending calls.”);
20 *Blair v. CBE Group Inc.*, No. 13-cv-134-MMA(WVG), 2013 WL 2029155, at *3 (S.D. Cal. May
21 13, 2013); *Robinson v. Midland Funding*, No. 10-cv-2261-MMA(AJB), 2011 WL 1434919, at *5
22 (S.D. Cal. Apr. 13, 2011); *Olney*, 2014 WL 294498 (S.D. Cal. Jan. 24, 2014); *see also*
23 *Higgenbotham*, No. 13-cv-02624-JTM-JPO at 2-3 (“The 2008 Order made clear that the TCPA
24 applies to calls made for the purpose of collecting a debt.”).

25 In light of the ability of most courts to follow the FCC’s clear guidance from 2008 that
26 the prohibition on calling cellphones without consent “applies regardless of the content of the
27 call” —which was only six years ago—there is little basis for staying the instant case in the off-
28 chance that the FCC will use the CI Petition to upend its prior decision. *See* 23 F.C.C. Rcd. at
565, n.42.

1 **B. A Stay is Inappropriate in any Case Because any FCC Decision Wouldn't Be**
2 **Applied Retroactively.**

3 As an additional point, any change to the FCC's long-standing rules that a predictive
4 dialer is considered an ATDS and that the TCPA applies to debt collection calls would likely not
5 be retroactive. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that
6 agency rules are generally not to be applied retroactively). The predictive dialer used by
7 Nationstar was considered an ATDS at the time the calls were made, and Nationstar is liable for
8 its past conduct regardless of whether the FCC rules at some future date that the predictive dialer
9 it used is exempt from the TCPA going forward. *See Frydman v. Portfolio Recovery Associates,*
10 *LLC*, No. 11-cv-524, 2011 WL 2560221, at *7 (N.D. Ill. June 28, 2011) (refusing to apply
11 primary jurisdiction doctrine, in part because "[w]hatever the FCC decides . . . will not affect
12 plaintiffs' claims because any ruling likely will be prospective only"). As such, any stay (really,
13 none should be issued) should be limited to claims for injunctive relief only.

14 **C. Considerations Applicable to Stays More Generally Weigh Against Freezing**
15 **the Litigation Here.**

16 As a final point, considerations regarding stays more generally caution significantly
17 against issuing one in the instant case. When granting a stay, the Court must weigh "the
18 competing interests which will be affected by the granting or refusal to grant a stay." *Lockyer v.*
19 *Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX Inc. v. Hall*, 300 F.2d 265, 268
20 (9th Cir. 1962)). "Among those competing interests are the possible damage which may result
21 from the granting of a stay, the hardship or inequity which a party may suffer in being required
22 to go forward, and the orderly course of justice measured in terms of the simplifying or
23 complicating of issues, proof, and questions of law which could be expected to result from a
24 stay." *Id.* "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*,
25 520 U.S. 681, 708 (1997).

26 Nationstar ignores these considerations wholesale, when the simple truth is that a stay
27 only acts to prejudice the Plaintiffs. *See Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002)
28 ("Unnecessary delay inherently increases the risk that witnesses' memories will fade and

evidence will become stale.”) (citing *Sibron v. New York*, 392 U.S. 40 (1968)). Further, given the nature of complex class actions, it is often unclear until later stages of a case whether specific materials are relevant. The earlier they are identified, the earlier their preservation may be ensured. If Nationstar had its way, the case would simply go nowhere, when the most appropriate course would be for the case to proceed and, if the FCC rules in a way that Nationstar believes is relevant, it may notify the Court at that time.

IV. CONCLUSION

Although under appropriate circumstances a Court should stay litigation pending decisions by appropriate agencies, there’s simply no basis for doing so here. None of the issues Nationstar raises—capacity, reassigned numbers, or debt collection—are issues of first impression that haven’t been addressed by either the FCC, the courts, or both, in the past. Rather, each issue has been decided repeatedly—Nationstar simply disagrees with the outcome. Furthermore, staying litigation pending an FCC decision, which could take years to be issued, has become somewhat of a game for defendants—as the number of stays that are granted increases, so too does the number of petitions filed seeking to re-litigate and legislate already settled questions. As such, and because a stay would only allow Nationstar to continue its unlawful conduct while discovery grows stale, this Court should deny Nationstar’s Motion for Stay and award such additional relief as it deems necessary and just.

**ROBERT JORDAN, SEAN HALBERT, and
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individually and on behalf of classes of similarly
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Dated: July 24, 2014

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CERTIFICATE OF SERVICE

I, Megan Lindsey, an attorney, hereby certify that I served *Plaintiffs' Opposition to Defendant Nationstar Mortgage LLC's Motion for Stay Pursuant to the Primary Jurisdiction Doctrine (Dkt. 33.)* by causing true and accurate copies of such papers to be transmitted to the persons shown below via electronic mail and First Class Mail on July 24, 2014 as follows:

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